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CITATIONS

710977—46

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 324

ESTATE OF FRANK A. VANDERLIP, DECEASED, NARCISSA COX VANDERLIP, VIRGINIA VANDERLIP SCHOALES, FRANK A. VANDERLIP, JR., KELVIN COX VANDERLIP, CITY BANK FARMERS TRUST COMPANY, AS EXECUTORS, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings of fact and opinion of the Tax Court (R. 54–62) are reported in 3 T. C. 358. The opinion of the Circuit Court of Appeals (R. 75–79) is reported in 155 F. 2d 152.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 23, 1946. (R. 80–81.) The

petition for a writ of certiorari was filed on July 23, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the transfer of insurance policies to trustees, which was motivated solely by the decedent's desire to avoid estate taxes thereon, was a gift made in contemplation of the decedent's death within the meaning of section 302 (c) of the Revenue Act of 1926.

STATUTE AND REGULATIONS INVOLVED

Revenue Act of 1926, c. 27, 44 Stat. 9:

> SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> * * * * *
>
> (c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of * * * his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. * * *[1]

[1] This section was amended, but in particulars not material here, by Section 803 of the Revenue Act of 1932, c. 209, 47 Stat. 169, and by Section 404 of the Revenue Act of 1934, c. 277, 48 Stat. 680.

Treasury Regulations 80 (1937 ed.):

> ART. 16. [As amended by T. D. 4966, 1940–1 Cum. Bull. 220] *Transfers in contemplation of death.*—
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> * * * * *
>
> The phrase "contemplation of death," as used in the statute, does not mean, on the one hand, that general expectation of death such as all persons entertain, nor, on the other, is its meaning restricted to an apprehension that death is imminent or near. A transfer in contemplation of death is a disposition of property prompted by the thought of death (though it need not be solely so prompted). A transfer is prompted by the thought of death if it is made with the purpose of avoiding the tax, or as a substitute for a testamentary disposition of the property, or for any other motive associated with death. The bodily and mental condition of the decedent and all other attendant facts and circumstances are to be scrutinized to determine whether or not such thought prompted the disposition.

STATEMENT

The facts were stipulated (R. 28–30) and were found by the Tax Court as stipulated (R. 55–58). They may be summarized as follows:

The decedent, Frank A. Vanderlip, died June 29, 1937, at the age of 73, survived by his wife, six children and several grandchildren. The

estate tax return showed a gross estate of approximately one million dollars. There had been no material change in the amount of the estate from June 1, 1932, to the date of his death. (R. 55.)

On June 1, 1932, at the age of 68, the decedent made an irrevocable transfer in trust of certain policies of insurance on his life aggregating $923,868.60, for the benefit of his wife and descendants, all issued prior to the effective date of the Revenue Act of 1918.[2] These policies comprised the sole assets of the trust until his death. (R. 55–56.)

Before the transfer, the decedent had borrowed $398,898.51 upon the security of the policies, that amount representing the maximum loan value on the date of the transfer. (R. 56.)

The trustees invariably applied to the payment of premiums and of interest on each policy loan all dividends on the policies, together with the maximum additional loan values created as a result of the payment of each new premium. The total amount of the policy loans procured by the trustees subsequent to the transfer of the policies to them and applied by them in partial payment of premiums and interest on policy loans was $114,539.69. The decedent paid the balance of

[2] As stated by the Tax Court (R. 58), the record does not disclose whether the proceeds of the policies were payable upon his death to named beneficiaries or to his estate.

premiums and interest in the total sum of $183,026.45. (R. 56.)

The only value of the policies comprising the corpus of the trust was the difference between the loan value and the terminal reserve value. At the decedent's death, the trustees received $421,815.66 as the proceeds thereof. (R. 58.)

It was stipulated and the Tax Court found that the transfer of the policies "was motivated solely by the decedent's desire to avoid estate taxes thereon and was not otherwise made in contemplation of death within the meaning of the Revenue Acts of 1926 and 1932, as amended, or of the Regulations thereunder." (R. 58, 59.)

Accordingly, the Tax Court stated that it was of the opinion that the decedent's sole motive in making the transfer was one connected with death and not with life and that the transfer was therefore one made in contemplation of death. (R. 59–60.) The Tax Court thereupon concluded that the proceeds of the policies realized by the trustees were properly included for estate tax purposes in the decedent's gross estate (R. 62), as the Commissioner had determined (R. 23). The Circuit Court of Appeals affirmed. (R. 80.)

ARGUMENT

The decision below is correct. It presents no conflict and there is no necessity for further review.

1. This Court in *Allen* v. *Trust Co. of Georgia,* 326 U. S. 630, 635, clearly stated that the purpose to avoid the estate tax as the inducing motive for a transfer *inter vivos* brings it within the ambit of the statute, because such motive is "of the sort which leads to a testamentary disposition" within the meaning of the estate tax statute as construed by the Court in *United States* v. *Wells,* 283 U. S. 102, 117. This is so, as the Court explains in the *Trust Co. of Georgia* case in accepting the government's contention (p. 635), because the purpose to avoid the tax would impel the decedent to make an *inter vivos* transfer rather than a will, and since the purpose of the contemplation of death provision of the statute was to reach substitutes for testamentary dispositions in order to prevent evasions of the tax (p. 635)—

> the statute is satisfied, * * * where for any reason the decedent becomes concerned about what will happen to his property at his death and as a result takes action to control or in some manner affect its devolution.

Contrary to petitioners' contention, the decision below is not in conflict with *Allen* v. *Trust Co. of Georgia.* It is true that this Court, in affirming the decision of the lower court in the *Trust Co. of Georgia* case, held that the transfer or the relinquishment of the power to amend which was there involved was not made in con-

templation of the decedent's death. This holding, however, was rested upon the concurrent findings of the two lower courts (p. 636) that the transfers and the relinquishment of the powers to amend were, under the facts of the case, parts of one integrated transaction, the dominant motive for which was to assure income to each of the decedent's two impecunious children, with the result that the purpose to avoid the tax was merely incidental.

Here there is no similar finding. On the contrary, this case is presented upon a stipulation (R. 30) and a finding based thereon (R. 58) that the *sole* purpose of the decedent in making the transfer was to avoid estate taxes thereon. The concurrent findings of the two lower courts herein are to the effect that the transfer was made in contemplation of death. Furthermore, the life insurance policies transferred in 1932 were acquired by the decedent more than 13 years prior thereto, and during this period the decedent appears to have been the unrestricted owner of the policies. Thus, this case presents the very situation which this Court said did not exist in the *Trust Co. of Georgia* case, namely, that of "a settlor, having made one plan for the disposition of his property, later makes a different one to avoid estate taxes." P. 636.

2. The petitioners further assert (Pet. 6) that the decision of the Circuit Court of Appeals is in

conflict with the decision of the Circuit Court of Appeals for the Third Circuit in *Denniston* v. *Commissioner,* 106 F. 2d 925. The asserted conflict is not argued in the petitioners' brief in support of the petition. However, we submit that there is no existing conflict. In the *Denniston* case the Circuit Court of Appeals for the Third Circuit concluded that a desire to save taxes was not conclusive of a mental state such as is contemplated by the statutory phrase "contemplation of death" where a coexistent motive to complete a long established policy of dividing property equally among children was also present. However, where the controlling motive for an *inter vivos* transfer was the transferor's desire to escape the payment of estate taxes, the Third Circuit has agreed that the transfer must be considered to have been made in contemplation of death. In *Commonwealth Trust Co. of Pittsburgh* v. *Driscoll,* 50 F. Supp. 949 (W. D. Pa.), the District Court so held and the Circuit Court of Appeals for the Third Circuit affirmed *per curiam,* 137 F. 2d 653, "for the reasons sufficiently and satisfactorily given in the opinion" of the District Court.[3]

3. The petitioners further contend (Br. 12–14) that Congress did not intend Section 302 (c) to

[3] In the case at bar no co-existent life motive was suggested.

apply to insurance payable to a designated beneficiary. This contention is advanced notwithstanding the fact that the record does not disclose whether the proceeds of the policies were payable upon decedent's death to named beneficiaries or to his estate. (R. 58.) Assuming, however, as did the Circuit Court of Appeals (R. 77), that the policies were all payable to the decedent's executors, it is now well settled that life insurance may become the subject of a transfer in contemplation of death within the meaning of Section 302 (c) of the Revenue Act of 1926, *supra*. *First Trust & Deposit Co.* v. *Shaughnessy*, 134 F. 2d 940 (C. C. A. 2d), certiorari denied, 320 U. S. 744. The legislative history upon which the taxpayer relies (Br. 12–13) deals with the taking out of insurance, not with the problem presented here, the transfer of outstanding life insurance policies—a transfer which occurred at a time when such transfers were specifically covered by the taxing section. Since the tax is not levied in respect of the inclusion in the decedent's gross estate of the proceeds of life insurance as such, but in respect of the transfer in contemplation of death of property rights in the policies, there is no basis for the contention.

CONCLUSION

The decision below is in accord with the principles announced by this Court in *Allen* v. *Trust*

Co. of Georgia. There is no conflict. The petition should be denied.

Respectfully submitted.

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